LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 3 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1966

No. 1114

ERWINE LAVERNE,

*Appellant,*

*against*

PIRANESI IMPORTS, INC.,

*Appellee.*

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

## JURISDICTIONAL STATEMENT

MONROE H. FREEDMAN,
720—20th Street, N.W.,
Washington, D. C.,
*Counsel for Appellant.*

*Of Counsel:*
LUBELL, LUBELL AND JONES,
JONATHAN W. LUBELL,
STEPHEN L. FINE,
165 Broadway,
New York, N. Y. 10006.

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statutes Involved | 4 |
| Questions Presented | 5 |
| Statement of the Case | 6 |
| The Questions Are Substantial | 10 |
| 1. The Question of the Relationship Between Statutory Summary Proceedings Which Permit Disposition of Disputed Factual Issues Without a Full Hearing or Trial and the Requirements of Due Process | 10 |
| 2. The Question of the Right to Meaningful Legal Representation in Civil Cases | 15 |
| Conclusion | 19 |
| Appendix: | |
| Opinion of New York County Supreme Court on Motion for Appointment of Receiver | 1a |
| Order of New York County Supreme Court Directing Appointment of Receiver | 2a |
| Opinion of New York County Supreme Court on Motion for Turn-Over of Stock Certificate | 6a |
| Order of New York County Supreme Court Directing Turn-Over of Stock Certificate | 7a |
| Order and Opinion of New York County Supreme Court Denying Defendants' Application for Reargument | 9a |
| Appellate Division Order Affirming Order Directing Turn-Over of Stock Certificate | 10a |
| Appellate Division Order Affirming Order Appointing Receiver | 12a |

## Cases Cited


| | PAGE |
|---|---|
| Anonymous v. Baker, 360 U.S. 287 (1959) | 14, 18 |
| Armstrong v. Manzo, 380 U.S. 545 (1965) | 16 |
| Avrick v. Rockmont Envelope Co., 155 F. 2d 568 (10th Cir. 1946) | 11 |
| Baxstrom v. Herold, 383 U.S. 107 (1966) | 17 |
| Cincinnati Street R. Co. v. Snell, 193 U.S. 30 (1904) | 10 |
| Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) | 11, 14, 15, 17 |
| Colby v. Klune, 178 F. 2d 872 (2nd Cir. 1949) | 12 |
| Dahnke-Walker Milling Company v. Bondurant, 257 U.S. 282 (1921) | 3 |
| Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523 (1939) | 12 |
| Douglas v. California, 372 U.S. 353 (1963) | 17 |
| Escobedo v. Illinois, 378 U.S. 478 (1964) | 17 |
| Ex Parte Hidekuni Iwata, 219 Fed. 610 (D.C.S.D. Cal. S.D. 1915) | 17 |
| Flournoy v. Wiener, 321 U.S. 253 | 4 |
| Frito-Lay, Inc. v. Morton Foods, Inc., 316 F. 2d 298 (10th Cir. 1963) | 11 |
| Galpin v. Page, 18 Wall. 350 (1873) | 11 |
| Gideon v. Wainwright, 372 U.S. 335 (1963) | 16, 17 |
| Groban, Re, 352 U.S. 330 (1957) | 14 |
| Hamilton v. Alabama, 368 U.S. 52 (1961) | 17 |
| Hawk v. Olson, 326 U.S. 271 (1945) | 16 |
| Hite v. Hite, 124 Cal. 389 (1899) | 13, 14 |
| Holmes v. Conway, 241 U.S. 624 (1916) | 14 |
| Holt v. Virginia, 381 U.S. 131 (1965) | 17 |
| Hurwitz v. North, 271 U.S. 40 (1921) | 14 |
| Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88 (1913) | 12 |

PAGE

Kent v. U.S., 383 U.S. 541 (1966) ..... 17

Louisville & Nashville Railroad Co. v. Schmidt, 177 U.S. 230 (1900) ..... 10, 14

Lunce v. Overlade, 244 F. 2d 108 (7th Cir. 1957) ... 16

McDonald v. Moore, 353 F. 2d 106 (5th Cir. 1965) ... 17

Miranda v. Arizona, 384 U.S. 436 (1966) ..... 17

New Hampshire Fire Insurance Co. v. Scanlon, 362 U.S. 404 (1960) ..... 10

N.Y. v. O'Neill, 359 U.S. 1 (1959) ..... 14

People v. Breese, 34 Ill. 2d 61 (1966) ..... 17

People ex rel. Harris v. Ogilvie, Ill. 2d , 221 N.E. 2d 265 (1966) ..... 18

Powell v. Alabama, 287 U.S. 45 (1932) ..... 15, 16

Prudential Insurance Co. v. Cheek, 259 U.S. 530 (1922) ..... 4

Rogers v. Peck, 199 U.S. 425 (1905) ..... 10

Simon v. Craft, 182 U.S. 427 (1901) ..... 10

Snyder v. Mass, 291 U.S. 97, (1934) ..... 11

Twining v. New Jersey, 211 U.S. 78 (1908) ..... 10

Ungar v. Sarafite, 376 U.S. 575 (1964) ..... 18

U.S. v. Boyden, 248 F. Supp. 291 (1961) ..... 17

U.S. v. McFaddin Express, Inc., 310 F. 2d 799 (2nd Cir. 1962) ..... 16, 17

U.S. ex rel. Tillery v. Cavell, 294 F. 2d 12 (3rd Cir. 1961) ..... 16

Welsh v. U.S. 348 F. 2d 885 (6th Cir. 1965) ..... 17

White v. Ragen, 324 U.S. 760 (1945) ..... 16

Willner v. Committee On Character & Fitness, 373 U.S. 96 (1963) ..... 14

## Other Authorities Cited


| | PAGE |
|---|---|
| A Critique, 38 N.Y. St. B.J. 479 (Dec., 1966) | 10 |
| Botein, Bernard: The Case Against Instant Justice, 52 A.B.A.J. 713 (Aug., 1966) | 10 |
| Desmond, Charles S.: The Courts, the Public and the Law Explosion | 10 |
| Kaufman, Irving R.: Courts in Crisis: Progress Versus Intransigence, 52 A.B.A.J. 1026 (Nov., 1966) | 10 |
| New York Civil Practice Law and Rules: | |
| Section 5228(a) | 4, 14 |
| Section 5225 | 5, 14 |
| 28 U.S.C.: | |
| Sec. 1257(a) | 3 |
| Sec. 1257(3) | 4 |

IN THE

# Supreme Court of the United States

October Term, 1966

No.

---

ERWINE LAVERNE,

*Appellant,*

*against*

PIRANESI IMPORTS, INC.,

*Appellee.*

---

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

---

## JURISDICTIONAL STATEMENT

Appellant appeals from two orders of the Appellate Division of the Supreme Court of the State of New York, both entered on July 7, 1966, affirming two orders of the Supreme Court of the State of New York entered on December 20, 1965 and January 6, 1966, which orders appointed a Receiver of the property of the Appellant and directed the Appellant to turn over a certain stock certificate to the Sheriff of the City of New York. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## Opinions Below

The following opinions and orders below are relevant to this appeal, and are attached hereto as an Appendix:

New York County Supreme Court Opinion on Motion for Appointment of a Receiver (November 22, 1965, unreported) (1a, *infra*);

New York County Supreme Court Order Directing Appointment of Receiver (January 6, 1966, unreported) (2a, *infra*);

New York County Supreme Court Opinion on Motion for Turn-Over of Stock Certificate (November 22, 1965, unreported) (6a, *infra*);

New York County Supreme Court Order Directing Turn-Over of Stock Certificate (December 20, 1965, unreported) (7a, *infra*);

New York County Supreme Court Order and Opinion Denying Defendants' Application for Reargument (February 15, 1966, unreported) (9a, *infra*);

Appellate Division Order Affirming Order Appointing Receiver (July 7, 1966, — A.D. 2d, 272 N.Y.S. 2d 705) (12a, *infra*);

Appellate Division Order Affirming Order Directing Turn-Over of Stock Certificate (July 7, 1966, — A.D. 2d, 272 N.Y.S. 2d 705) (10a, *infra*).

## Jurisdiction

Appellant, who had guaranteed certain obligations, became a judgment debtor of the Appellee. Appellee, as a judgment-creditor, thereafter commenced summary proceedings under Title 52 of the New York Civil Practice Law and Rules. By means of a motion with an accom-

panying affidavit, Appellee sought to obtain the appointment of a receiver pursuant to Section 5228, C.P.L.R. Appellee's allegations were sharply disputed by Appellant. Nevertheless, without a hearing and solely upon the papers containing sharp disputes of fact, the Supreme Court, under Section 5228, C.P.L.R. appointed a receiver over what was alleged to be Appellant's property, including the sum of $89,000.00 which, in the same summary proceeding without a hearing on disputed allegations, was "found" to have been fraudulently transferred or hidden. In a similar fashion, by means of a motion and affidavit, appellee sought to obtain an order directing the turnover of a certain stock certificate. Again, notwithstanding sharp disputes of facts on which there was no hearing, the Supreme Court, under Section 5225, C.P.L.R., directed the turnover of the stock certificate. The two orders were affirmed by orders of the Appellate Division, First Judicial Department, dated July 7, 1966 (10a, 12a, *infra*). The Appellate Division thereby found Sections 5228 and 5225 constitutional notwithstanding the direct constitutional challenge presented by Appellant to that Court. A motion for leave to reargue or for leave to appeal to the New York Court of Appeals was denied on September 27, 1966. A motion to the New York Court of Appeals for leave to appeal thereto was dismissed by order dated December 30, 1966. Notice of appeal to this Court was filed in the New York County Supreme Court on January 5, 1967. The jurisdiction of this Court to review the case on appeal is conferred by 28 U.S.C. Sec. 1257(2). *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U.S. 282 (1921), sustains this jurisdiction.

Appellant also contends that the orders are founded on another error, which, though it involves questions not subject to review by this Court on appeal, nevertheless deprives Appellant of a fair hearing and constitutes a denial of due process in violation of the Fourteenth Amend-

ment. This error is included in the statement of questions presented by the Appeal and the description of the substantiality of the questions, hereinafter set forth. If this were the only error complained of, Appellant would be limited to a Petition for Writ of Certiorari under 28 U.S.C. Sec. 1257(3). It is included on this Appeal under the authority of *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944) and *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 547 (1922).

## Statutes Involved

New York Civil Practice Law and Rules Section 5228(a):

> (a) Appointment of receiver. Upon motion of a judgment creditor, upon such notice as the court may require, the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment. As far as practicable, the court shall require that notice be given to the judgment debtor and to any other judgment creditors of the judgment debtor. The order of appointment shall specify the property to be received, the duties of the receiver and the manner in which they are to be performed. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. A receiver shall be entitled to necessary expenses and to such commissions, not exceeding five percent of the sums received and disbursed by him, as the court which appointed him allows, but if a judgment creditor is appointed receiver, he shall not be entitled to compensation. If a receiver has been appointed, a court making an order directing payment, or delivery, of property shall direct that payment, or delivery, be made to the receiver rather than to a sheriff. Sections 6402, 6403, 6404 and 6405 are applicable to receivers appointed under this subdivision.

New York Civil Practice Law and Rules Section 5225(a):

> Section 5225. Payment or delivery of property of judgment debtor.
>
> (a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

## Questions Presented

Whether a state statute (Sec. 5228(a) N.Y.C.P.L.R.) violates due process by providing for the appointment of a receiver of the property of Appellant including a sum of $89,000 concurrently found to have been fraudulently transferred or hidden, in a summary proceeding without a hearing and exclusively upon papers containing sharp disputes of fact.

Whether a state statute (Sec. 5225(a) N.Y.C.P.L.R.) violates due process by providing for the turnover of Appellant's personal property in a summary proceeding without a hearing and exclusively upon papers containing sharp disputes of fact.

Whether Appellant was deprived of due process by being deprived of the right to meaningful legal representation, where the Court ordered the appointment of a receiver and directed the turnover of a certain stock certificate in

summary proceedings after denying Appellant's request for a two-week adjournment, notwithstanding that Appellant had newly retained counsel who had not yet even received the file from previous counsel, who was then in the process of moving his office and who was suffering from a physical ailment.

## Statement of the Case

Appellant, a judgment debtor, has been subject to two orders in summary proceedings under Article 52 of the New York Civil Practice Law and Rules governing the enforcement of money judgments by which a receiver has been appointed over what is alleged to be his property and he has been directed to turn over specific personal property. The summary proceedings herein, devoid of any hearing, consisted only of affidavits and exhibits, all containing sharp factual disputes. The proceedings took place when Appellant's new attorney was ill and had not had sufficient time to prepare. Nevertheless, the New York Supreme Court, applying Sections 5228 and 5225, C.P.L.R., either ignored the factual disputes or decided them without a hearing and thereupon issued orders which have deprived Appellant of his property. The manner in which Appellant's property rights were destroyed in summary proceeding without a hearing is described immediately below.

Appellee moved by notices of motion and supporting affirmations, for an order appointing a Receiver and for an order directing the Appellant to deliver a certain stock certificate to the Sheriff of New York County. The appellant's newly retained attorney submitted an affidavit requesting a two-week adjournment upon the grounds that he had been just recently substituted as attorney, he had not yet received the papers and files from the previous attorneys, he was in the process of moving his own offices, and he was suffering from a physical ailment. (Application

for Adjournment—Schmidt Affidavit.) This request for adjournment was denied. Thereupon, Appellant submitted an affidavit in opposition to the motion sharply controverting the allegations made in Appellee's moving affidavit. Notwithstanding the denial of adjournment to Appellant, the court accepted from Appellee's attorney a reply affirmation with seven exhibits to which Appellant had no opportunity whatsoever to respond. The motions were granted by the Supreme Court (1a, 6a, *infra*).

Appellant moved for reargument on December 15, 1965 and submitted an affidavit in support with annexed exhibits which again sharply, and in great detail, disputed the allegations contained in Appellee's moving papers. Appellant's application for reargument was denied (9a, *infra*).

The allegations of Appellee in support of its motion for a Receiver (Nathan affirmation, Oct. 22, 1965; Nathan Reply Affirmation, Nov. 8, 1965) were sharply disputed by Appellant. (Laverne Affidavit, Dec. 15, 1965.) Thus, the papers on the summary proceeding show sharp factual disputes as to: whether Laverne, Inc. transferred its assets to Laverne International, Ltd. for no consideration; whether Appellant's wife had title to the stock in Furniture Textiles & Wallcoverings Inc.; the propriety of the assignment for benefit of creditors and sale of the assets of Furniture Textiles & Wallcoverings Inc.; whether Appellant had "looted" Furniture Textiles & Wallcoverings Inc.; whether Appellant had fraudulently transferred assets of Furniture Textiles & Wallcoverings Inc.; whether Appellant had failed to appear in an action brought by the Trustee in Bankruptcy of Furniture Textiles & Wallcoverings Inc.; whether Appellant had been in contempt for alleged failure to appear on behalf of three corporations; whether Appellant is actively and currently involved in running Laverne International Ltd. These disputed facts were the main bases upon which the Court, without hearing, ordered the appointment of a Receiver of property of Appellant.

The deprivation of Appellant's property in the statutory summary proceeding, without a full hearing and in utter disregard of the patent factual disputes is strikingly demonstrated in regard to the $89,000 item. Appellee's attorney alleged that Appellant was not telling the truth when he stated he had transferred the $89,000 settlement of a personal injury action to his son in Israel and charged that Appellant was seeking to avoid payment of the judgment against him. In support of this contention of a fraudulent transfer, Appellee relied upon parts of an examination of Appellant in which Appellant stated he had given the money as a gift to his son in Israel in 1962, but was unable to give his son's residence address there and had no gift tax return with respect thereto.* Upon the motion for reargument, Appellant noted that Appellee had failed to state that the personal injury recovery was made two years prior to the judgment obtained by Appellee against Appellant. While Appellee's attorney dismissed this fact with the statement that the important date was the date when the money was given to Appellant's son, he failed to note that the very examination of Appellant relied upon by Appellee in the moving papers specifically states that the money was given to Appellant's son at the time that Appellant received it—in 1962. Thus, the issue of whether there was a fraudulent transfer of funds to Appellant's son was in sharp dispute. The only basis upon which Appellee could support its contention of fraud was the failure of Appellant to give his son's address or the particulars regarding the attorney or insurance company

* It is not without significance that the transcript relied upon by Appellee was never signed by Appellant and Appellant never had an opportunity to make corrections of the many errors in the whole transcript or to supply information which he did not have at the time of the examination. Appellee's attorney, on the other hand, has relied upon this uncorrected transcript, although he had no personal knowledge of its accuracy, since he did not personally participate in the examination.

in the personal injury claim. Nevertheless, without a hearing and upon these sharply controverted facts, the Court ordered the appointment of a Receiver, found that the funds had been fraudulently transferred and directed the Receiver to receive the said $89,000.

With respect to Appellant's claim that he has been denied due process because he was deprived of the right to meaningful legal representation, the facts of the recent entry of a new attorney for Appellant, his physical condition, the transitory nature of his office at the time, and his not having received the files while the motion was pending have never been contradicted by Appellee.

Notwithstanding Appellant had newly retained counsel who was ill and who had not been afforded a reasonable time to familiarize himself with the proceedings, Appellant did claim a right to a trial "where sharply contested and flatly contradicted issues of fact in so momentous a matter as an application for appointment of a receiver develop in the motion papers . . ." (Laverne Affidavit, Dec. 15, 1965, para. 9). Appellant's request for a "full hearing" (*Ibid.*, para. 31) was not expressly passed upon by the Supreme Court (9a, *infra*). Before the New York Appellate Division, First Judicial Deparment, Appellant contended that the order appointing a receiver and the turnover order violated due process because Appellant was denied a hearing where there were sharply disputed questions of fact and was denied meaningful legal representation. Appellant's contentions were not expressly passed upon by the Appellate Division which affirmed the orders without opinion (10a, 12a *infra*). The same contentions were raised in Appellant's motion for leave to appeal to the New York Court of Appeals but were not passed upon by that Court in dismissing the motion.

## The Questions Are Substantial

### 1. The Question of the Relationship Between Statutory Summary Proceedings Which Permit Disposition of Disputed Factual Issues Without a Full Hearing or Trial and the Requirements of Due Process.

"Summary trial of controversies over property and property rights is the exception in our method of administering justice." *New Hampshire Fire Insurance Co.* v. *Scanlon*, 362 U.S. 404, 406 (1960). Notwithstanding this rule there appears to be a trend in modern practice to greatly increase the availability of summary disposition of cases—*i.e.*, dispositions without opportunity for full hearings or trials. The existence of heavily congested court calendars and the public criticism of the administration of justice resulting from delays of years before reaching trial have been formidable pressures upon the courts and legislatures to find novel approaches to the expeditious disposition of business. See, *e.g.*, Charles S. Desmond: The Courts, the Public, and the Law Explosion: A Critique, 38 N.Y.St.B.J. 479 (Dec., 1966); Bernard Botein: The Case Against Instant Justice, 52 A.B.A.J. 713 (Aug., 1966), Irving R. Kaufman: Courts in Crisis: Progress Versus Intransigence, 52 A.B.A.J. 1026 (Nov., 1966).

However novel the mode of summary proceeding, the question of whether due process has been afforded the litigant remains. Thus, although a state is normally not circumscribed in the mode of proceeding it adopts, the essential elements of due process, viz., notice and hearing, must be preserved, no matter what the mode. *Louisville & Nashville Railroad Co.* v. *Schmidt*, 177 U.S. 230 (1900); *Simon* v. *Craft*, 182 U.S. 427 (1901); *Cincinnati Street R. Co.* v. *Snell*, 193 U.S. 30 (1904); *Rogers* v. *Peck*, 199 U.S. 425 (1905); *Twining* v. *New Jersey*, 211 U.S. 78 (1908). Notice and hearing are utterly indispensable to due process; "What may not be taken away is notice of the charge

and an adequate opportunity to be heard in defense of it." *Snyder* v. *Mass.*, 291 U.S. 97, 105 (1934).

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."
>
> *Galpin* v. *Page*, 18 Wall. 350, 368, 369 (1873).

Similarly, no matter how noble the motive behind summary procedures, these essentials of due process must be secured; they are not to be denied because of the desire for an expeditious disposition of cases, *Avrick* v. *Rockmont Envelope Co.*, 155 F. 2d 568, 573 (10th Cir. 1946); *Frito-Lay, Inc.* v. *Morton Foods, Inc.*, 316 F. 2d 298, 300 (10th Cir. 1963), or because of a belief that on a hearing the court would not be convinced otherwise, *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

Within these recognized Constitutional principles, the application of due process to summary proceedings urgently requires clarification. Where there is no right to a jury trial in state courts, is a litigant entitled to a full hearing or trial with cross-examination and the opportunity to refute opposing evidence, where factual issues exist? Is the due process guarantee of a "day in court" satisfied where disputed factual questions are determined on affidavits? The question herein is the dimension of the due process requirement in civil cases where summary proceedings are utilized. In view of the growing reliance upon summary proceedings in civil matters, the question herein is substantial, involving both the nature of a "hearing" under the due process requirement and the rights of litigants throughout the United States not to have their

property or claims to property disposed of by a court based exclusively upon affidavits containing factual disputes.

The corrosive effect of trial by affidavits upon the right to a hearing has been noted in the past.

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit,' improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. * * *
>
> "We hear much of crowded trial dockets as the cause of deplorable delays in the administration of justice. The way to eliminate that congestion is by the appointment of a sufficient number of judges, not by doing injustice through depriving litigants of a fair method of trial."
>
> *Colby* v. *Klune,* 178 F. 2d 872, 873 (2nd Cir. 1949) per Frank, C.J.

In 1939 the Illinois Supreme Court held unconstitutional a summary judgment statute which permitted the trial judge to enter summary judgment against a defendant where the plaintiff's affidavits asserted that the defendant's affidavits were made in bad faith. The statute there allowed the judge to act solely on the basis of the affidavits which he, for one reason or other, chose to believe. *Diversey Liquidating Corp.* v. *Neunkirchen,* 370 Ill. 523 (1939).

In *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U.S. 88 (1913), where the government asserted that the ICC findings must be presumed to have been supported, even though not formally proved at the hearing, this Court indicated, in language equally applicable to "trial by affidavit," that

> "the more liberal the practice in admitting testimony, the more imperative the obligation to pre-

> serve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; . . ." (At 93.)

And almost 70 years ago the California Supreme Court recognized the constitutional infirmities implicit in battle by affidavit. *Hite* v. *Hite,* 124 Cal. 389, 392, 393 (1899). There, the court said:

> "Whatever hardships may result, the court cannot lawfully take by final decree money from A and give it to B, . . . when A disputes the facts upon which his liability is made to depend, without a trial and a determination of the issue made. The hardship to B cannot modify the imperative rule of law and the absolute constitutional guaranty."

The instant case directly involves the substantial constitutional question present when trial by affidavit is adopted in the place of a full hearing. A receiver was ordered appointed over the property of Appellant, including a specific item of $89,000.00, upon papers containing allegations of fact which were sharply in dispute. Notwithstanding this sharp factual dispute, the Court failed to order a trial or even a full hearing on the matter whereat Appellant could introduce evidence and testimony; instead, the Court decided the motion, appointed a referee and determined that the $89,000.00 had been fraudulently transferred by Appellant, solely upon the papers. The New York Supreme Court further ordered the turnover of the stock certificate without a hearing, where there was a sharp dispute as to whether the stock was of any value and

where Appellant had alleged in detail that the real motive was Appellee's attempt to abort a stockholder's derivative action which Appellant had brought.

The fact that the statutory summary proceedings herein (Section 5228 and 5225, N.Y.C.P.L.R.) involve proceedings after judgment does not alter the posture of the Constitutional question. The basic requirements of notice and hearing have been applied to summary proceedings where no plenary judicial action was involved, *Anonymous* v. *Baker*, 360 U.S. 287 (1959) (inquiry into improper activities at the bar); *N. Y.* v. *O'Neill*, 359 U.S. 1 (1959) (Uniform Law to Secure Attendance of Witnesses From Within or Without the State); *Re Groban*, 352 U.S. 330 (1957) (administrative proceedings); *Willner* v. *Committee On Character & Fitness*, 373 U.S. 96 (1963) (disbarment proceedings); *Hurwitz* v. *North*, 271 U.S. 40 (1921) (proceedings to revoke physician's license); to summary proceedings supplemental to a plenary action, *Hite* v. *Hite, supra;* to summary proceedings within a pending plenary action, *Holmes* v. *Conway*, 241 U.S. 624 (1916); as well as to summary proceedings coming after judgment for the purposes of enforcing that judgment, *Coe* v. *Armour Fertilizer Works, supra.*

The statutory provisions herein have permitted the appointment of a Receiver of the property of the judgment debtor, the determination that there was a fraudulent transfer of property to a third party and the ordering of Appellant to turn over a stock certificate upon affidavits containing disputes of fact without a hearing. "It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed 'due process of law'." *Coe* v. *Armour Fer-*

*tilizer Works, supra,* at 419 of 237 U.S.* Also see: *Louisville & Nashville R. Co.* v. *Schmidt, supra.*

This case, thus, presents the Court with an opportunity to define the scope and operation of the due process guarantee of a hearing in summary proceedings. The Constitutional bounds of this increasingly utilized mode of proceeding in civil causes needs delineation so that the administration of justice, while responding to the present-day need for expedition, secures to all litigants the full measure of due process guaranteed by the Fourteenth Amendment.

*The finding of a fraudulent transfer, and its accompanying quasi-criminal connotations, in a proceeding devoid of a hearing, witnesses or cross-examination and consisting solely of conflicting affidavits, by itself strikingly demonstrates the emasculation of the essentials of due process resulting from application of the statutory summary proceedings of Article 52, N.Y.C.P.L.R.*

## 2. The Question of the Right to Meaningful Legal Representation in Civil Cases.

It is now well settled in criminal causes that not only is an accused entitled to legal representation, *Powell* v. *Alabama,* 287 U.S. 45 (1932), but he has a substantial right

* In *Coe* the state statute charged stockholders of a corporation with liability for judgments against the corporation, as though principal judgment debtors, up to the full amount of unpaid stock subscriptions. There, on the basis of the books of the debtor-corporation, showing the amount of Coe's unpaid subscription, execution issued against Coe, without notice and hearing. This Court held the state statute repugnant to due process "which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation." (At p. 423 of 237 U.S.) There is a significant similarity in Constitutional principle between *Coe* and the case at bar where Appellant's property has been ordered to be taken without a hearing on disputed questions of fact and in satisfaction of a judgment.

to it. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). That representation must also be competent, *Lunce* v. *Overlade*, 244 F. 2d 108 (7th Cir. 1957). And within that right to competent legal representation is necessarily included an adequate opportunity to prepare a defense, *White* v. *Ragen*, 324 U.S. 760 (1945), *Hawk* v. *Olson*, 326 U.S. 271 (1945), *U.S. ex rel. Tillery* v. *Cavell*, 294 F. 2d 12 (3rd Cir. 1961).

The issue presented herein is whether a similar right to competent legal counsel exists for civil litigants, by virtue of the due process provision of the Fourteenth Amendment. Appellant does not raise herein the circumstances, if any, under which due process requires that a party be offered an attorney in a civil action. Rather, the issue herein is, where a party has an attorney, does due process require that the attorney have an opportunity to prepare the case or is this a matter solely resting in the discretion of the trial or motion court. Does the fundamental notion of fairness embodied in the due process clause require in civil causes that the litigant's attorney have a reasonable time to prepare?

This issue has not previously been passed upon by this Court. In *Powell, supra*, this Court did suggest that if, "in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (Emphasis added; at 69.)

Yet in *U.S.* v. *McFaddin Express, Inc.*, 310 F. 2d 799 (2nd Cir., 1962), a case involving an alleged conflict of interest and denial of property without due process, Circuit Judge Swan had to note that "No controlling federal decision is cited" (at 800).

While this Court has consistently held that notice and hearing are essential elements of due process, even in civil matters, *e.g.*, *Armstrong* v. *Manzo*, 380 U.S. 545

(1965), and has reversed lower courts for failure to provide the same regardless of the merits of the cause of the person asserting the rights, *Coe* v. *Armour Fertilizer Works, supra,* the Court in *McFaddin Express, Inc., supra,* turned down the claim because "A different attorney could have given no different advice" (at 800). The Court therein thus treated the right to legal representation as not falling within the same class of essential due process rights as notice and hearing; for, where notice and hearing are involved, a denial of due process is not mitigated by the view that no different result could have occurred in any event. The need for clarification in this area is obvious.

The rights of an accused to counsel have been recently spelled out. Thus a defendant in criminal cases is entitled to counsel at the accusatory stage, *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), *Miranda* v. *Arizona,* 384 U.S. 436 (1966); arraignment, *Hamilton* v. *Alabama,* 368 U.S. 52 (1961); trial, *Gideon* v. *Wainwright, supra;* on appeal, *Douglas* v. *California,* 372 U.S. 353 (1963); for misdemeanors, *McDonald* v. *Moore,* 353 F. 2d 106 (5th Cir. 1965); and, relying on the Criminal Justice Act of 1964 [P. L. 88-455, 88th Cong., Aug. 20, 1964, 78 Stat. 552, 18 U.S.C. Sec. 3006A], at revocation of probation proceedings, *U.S.* v. *Boyden,* 248 F. Supp. 291 (1965), but see *Welsh* v. *U.S.,* 348 F. 2d 885 (6th Cir. 1965), contra.

But extension of the due process right to areas not altogether criminal has not been made clear, and only continues to slowly develop. Thus, it has been recognized that one has the right to counsel, as an element of due process, in summary contempt proceedings, *Holt* v. *Virginia,* 381 U.S. 131 (1965); in deportation proceedings, *Ex Parte Hidekuni Iwata,* 219 Fed. 610 (D.C. S.D.Cal. S.D. 1915); in civil commitment proceedings, *People* v. *Breese,* 34 Ill. 2d 61 (1966); see also *Baxstrom* v. *Herold,* 383 U.S. 107 (1966); revocation of probation, *U.S.* v. *Boyden, supra;* juvenile court proceedings, *Kent* v. *U.S.,* 383 U.S. 541

(1966); extradition proceedings. *People ex rel. Harris* v. *Ogilvie,* — Ill. 2d —, 221 N.E. 2d 265 (1966). The right to counsel as an element of due process appears to have developed on a case by case basis, particularly so in the diverse fields of law where strictly criminal sanctions are not involved. *Cf.: Anonymous* v. *Baker, supra.*

The present case squarely presents the constitutional issue. It is uncontradicted that Appellant was denied a two-week adjournment of Appellee's motion, notwithstanding the fact that Appellant had newly retained counsel who had not yet received the files from Appellant's previous counsel, who was in the midst of moving his office and who was suffering from a physical ailment. Appellant's new counsel was retained on October 27, 1965 and Appellee's motions were returnable on November 5, 1965. There is no showing whatsoever that there would have been any prejudice in delaying the hearing of the motion for two weeks until Appellant's new counsel received the files and acquainted himself with the matter.

The issue is thus squarely presented herein whether the normal discretion of a Trial or Motion Judge to determine a request for an adjournment in a civil cause is restricted by the requirements of due process where denial of the adjournment has deprived a litigant of an opportunity to have his attorney prepared to represent him.

The instant case presents an example of that "myopic insistence upon expeditiousness in the face of a justifiable request for delay" which this Court warned, in *Ungar* v. *Sarafite,* 376 U.S. 575, 589 (1964), "can render the right to defend with counsel an empty formality." Appellant submits that the issues concerning the relationship of the Trial Court's normal discretion in expediting causes before it with the requirements of due process and meaningful legal representation deserve review and clarification by this Court.

## CONCLUSION

**For the aforesaid reasons Appellant respectfully submits that the questions are substantial and of considerable importance to litigants in federal as well as in state courts.**

Respectfully submitted,

MONROE H. FREEDMAN,
720—20th Street, N.W.,
Washington, D. C.,
*Counsel for Appellant.*

*Of Counsel:*
LUBELL, LUBELL AND JONES,
JONATHAN W. LUBELL,
STEPHEN L. FINE,
165 Broadway,
New York, N. Y. 10006.

# APPENDIX

## Opinion of New York County Supreme Court on Motion for Appointment of Receiver

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM—PART I

NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007

Present:

HON. FRANCIS T. MURPHY, JR., *Justice.*

Nov. 5, 1965

---

PIRANESI IMPORTS, INC.,

*against*

FURNITURE TEXTILE & WALLCOVERINGS, INC.

---

The following papers numbered 1 to 4 read on this motion, No. 95 on Calendar of Nov. 5, 1965.

| | *Papers Numbered* |
|---|---|
| Notice of Motion and Affidavit Annexed | 1-2 |
| Answering Affidavit | 3 |
| Pleadings—Exhibit | 4 |

Upon the foregoing papers this motion for the appointment of a receiver to take over property of the judgment debtor Erwine LaVerne is granted. The transcript

*Order of New York County Supreme Court Directing Appointment of Receiver*

of the examination of the judgment debtor indicates the need for the relief sought. Settle order.

FILED
JAN 6 1966
New York
County Clerk's Office

Dated November 22, 1965.

F. T. M.,
*J. S. C.*

County Clerk's No. 8610, 1961
Spec. I Liber P 139, Line 6, 1965

---

## Order of New York County Supreme Court Directing Appointment of Receiver

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the City of New York, on the 30th day of December, 1965.

Present:

HON. FRANCIS T. MURPHY, JR., *Justice.*

---

[SAME TITLE]

---

The above-named Piranesi Imports, Inc., plaintiff and judgment creditor herein having moved for an order appointing a Receiver herein of the property of the above-named defendant and judgment debtor, Erwine Laverne, and the matter having come on duly to be heard at a Special Term, Part I of the Supreme Court, on the 5th day of November, 1965,

*Order of New York County Supreme Court Directing Appointment of Receiver*

Now, upon reading and filing the Notice of Motion dated the 22nd day of November, 1965, and the affirmation of Edward Nathan dated the 22nd day of October, 1965 and the affirmation in reply of Edward Nathan dated the 8th day of November, 1965, together with Exhibits "A" to "G" inclusive attached to said reply affirmation, with proof of due service thereof upon said judgment debtor within the time and in the manner in said motion provided, and after hearing Edward Nathan, Esq., in support of said motion, and Godfrey P. Schmidt, Esq., in opposition, thereto all in support of said motion, and the affidavit of Erwine Laverne, sworn to November 4th, 1965, in opposition thereto, and after due deliberation having been had thereon, Noe, on motion of Edward Nathan, Esq., attorney for Piranesi Imports, Inc., the above-named judgment creditor, it is

ORDERED that Alfred K. Weiner, Esq. of 521 Fifth Avenue, New York be and he hereby is appointed Receiver of the following property:

a. The sum of $89,000.00 received in settlement by Erwine Laverne from India Airlines given by Erwine Laverne to his son, and fraudulently hidden or transferred.

2. Insurance policies and monies borrowed against these policies.

3. Payments made for Erwine Laverne's benefit by various corporations.

4. Salary owing Erwine Laverne from Laverne International, Inc.

and it is further

ORDERED that the receiver before entering upon his duties and in order to qualify therefor shall execute and

*Order of New York County Supreme Court Directing Appointment of Receiver*

file an oath herein that he will faithfully and fairly discharge the trust committed to him, and it is further

ORDERED that the receiver before entering upon his duties, and in order to qualify therefor shall cause an undertaking to be executed and filed herein, in the sum of $1,000.00, conditioned that he will faithfully discharge his duties, and it is further

ORDERED that the receiver take into possession, assume control of and administer or collect various claims and causes of action and other intangible items or property claimed by Erwine Laverne as shall be necessary for the purposes of satisfying this judgment or to do any other acts designed to satisfy the judgment and it is further

ORDERED that the said receiver be empowered to utilize all methods of discovery to locate the assets and claims of said defendant, and to bring such action as shall reduce them to his possession, and it is further

ORDERED that the receiver sell and convert into cash so much of the said property of the said defendant, Erwine Laverne, as shall be necessary for the purposes of satisfying this judgment, and it is further

ORDERED that the said receiver out of the money and the proceeds of the sale of the said property of the said defendant, Erwine Laverne, to pay to the said plaintiff the amount of their judgment, paying the sum of $35,066.36 plus interest on $29,099.04 from April 22nd, 1964, and it is further

ORDERED that the Receiver shall keep written accounts itemizing receipts and authorized expenditures, describing the aforementioned property and naming the depository

*Order of New York County Supreme Court Directing Appointment of Receiver*

of receivership funds, which accounts shall be open to the inspection of any person having an apparent interest in the property, and it is further

ORDERED that the said Receiver and any party to this proceeding or any person interested in the property which may be taken into hands of such Receiver may apply at any time on due notice to this Court for further or other instructions and for such further power as may be necessary to enable the Receiver to carry out properly the terms of this order and fulfill his duties as such Receiver.

Enter,

s/ F.T.M., Jr., J.S.C.

FILED
January 6th, 1966
New York County Clerk's Office

## Opinion of New York County Supreme Court on Motion for Turn-Over of Stock Certificate

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM—PART I

NEW YORK COUNTY

at the Courthouse therof, 60 Centre Street,
New York, New York 10007.

Present:

HON. FRANCIS T. MURPHY, JR., *Justice.*

Nov. 5, 1965

---

PIRANESI IMPORTS INC.,

*against*

FURNITURE TEXTILES and WALLCOVERINGS, INC.

---

The following papers numbered 1 to read on this motion, sumitted by Court, No. 96 on Calendar of Nov. 5, 1965.

| | *Papers Numbered* |
|---|---|
| Notice of Motion and Affidavits Annexed | 1-2 |
| Answering Affidavit | 3 |

Upon the foregoing papers this Motion to direct the delivery of certain property of the judgment debtor Erwine Laverne to the Sheriff of the County of New York is granted. Whether the property is worthless or without monetary value is not for the court to pass upon on a motion such as this. Settle order.

Dated: November 22, 1965.

F. T. M.
*J. S.C.*

County Clerk's No. 8610, 1961
Spec I Liber P 139 Line 3 1965

## Order of New York County Supreme Court Directing Turn-Over of Stock Certificate

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the City of New York, on the 16th day of December, 1965.

Present:

HON. FRANCIS T. MURPHY, JR.,
*Justice.*

---

[SAME TITLE]

---

On reading and filing the notice of motion, dated October 22nd, 1965, the affirmations of Edward Nathan dated the 22nd day of October and the 8th day of November, 1965, and the reply affirmation of Edward Nathan incorporated by reference to said affirmation of November 8th, 1965 which reply affirmation dated the 8th day of November, 1965, was in support of the judgment creditor's motion for the appointment of a receiver together with Exhibits "A" to "G" inclusive attached to said affirmation and upon proof of due service thereof, all in support of said motion, and the affidavit in opposition of Erwine Laverne, sworn to November 4th, 1965, after hearing Edward Nathan, Esq., attorney for the judgment creditor in support of the motion, and Godfrey P. Schmidt, Esq., attorney for the above-named judgment debtor in opposition, and due deliberation having been had, it is

ORDERED, that said motion be and the same is hereby granted in all respects; and it is

*Order of New York County Supreme Court Directing Turn-Over of Stock Certificate*

FURTHER ORDERED that Erwine Laverne, the abovenamed defendant and judgment debtor, be and he hereby is directed and commanded within three (3) days of service of a certified copy of this order sent by certified mail to Godfrey P. Schmidt, attorney for Erwine Laverne, judgment debtor, at 60 East 42nd Street, New York, New York, to deliver and turn over to the Sheriff of the City of New York, County of New York, (15) fifteen shares of stock in Piranesi Imports, Inc., issued on June 28th, 1957 as Stock Certificate No. 1, • • •

Enter,

s/ F. T. M.
*J. S. C.*

## Order and Opinion of New York County Supreme Court Denying Defendants' Application for Reargument

Supreme Court of the State of New York,
County of New York, Special Term, Part I.

Present:

HON. FRANCIS T. MURPHY,
*Justice.*

---

[SAME TITLE]

---

The following papers numbered 1 to used on this motion submitted-referred this 29th day of December, 1965, Calendar No. 64

| | *Papers Numbered* |
|---|---|
| Notice of Motion and Exhibits Annexed | 1,2,3,4 |
| Answering Affidavits | 5 |

Defendants' application for reargument of a motion heretofore decided by this court is denied. Despite the defendants' failure to follow the prescribed procedure to secure reargument, the court has considered the papers and finds that there is nothing presently presented which would warrant a recall or modification of the previous decision.

Dated: February 15, 1966.

F. T. M., JR.,
*J. S. C.*

## Appellate Division Order Affirming Order Directing Turn-Over of Stock Certificate

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 7th day of July, 1966.

Present:

HON. CHARLES D. BREITEL,
*Justice Presiding.*
" JAMES B. M. MCNALLY,
" AARON STEUER,
" LOUIS J. CAPOZZOLI,
*Justices.*

FILED July 7, 1966

---

PIRANESI IMPORTS, INC.,
Plaintiff-Judgment
Creditor-Respondent,

*against*

ERWINE LAVERNE,
Defendant-Judgment
Debtor-Appellant.

---

An appeal having been taken to this Court by the defendant-judgment debtor-appellant from an order of the Supreme Court, New York County, entered on the 20th day of December, 1965, directing appellant to turn over a certain stock certificate to the Sheriff of the City of New York, and said appeal having been argued by Mr. Henry Mark Holzer; of counsel for the appellant, and by Mr.

*Appellate Division Order Affirming Order Directing Turn-Over of Stock Certificate*

Edward Nathan, of counsel for the respondent; and due deliberation having been had thereon.

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $75. costs and disbursements to the respondent.

Enter,

/s/ FRANK H. CRABTREE,
Deputy Clerk.

## Appellate Division Order Affirming Order Appointing Receiver

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 7th day of July, 1966,

Present:

HON. CHARLES D. BREITEL,
*Justice Presiding.*
" JAMES B. M. MCNALLY,
" AARON STEUER,
" LOUIS J. CAPOZZOLI,
*Justices.*

FILED July 7, 1966

---

PIRANESI IMPORTS, INC.,
Plaintiff-Judgment
Creditor-Respondent,

*against*

ERWINE LAVERNE,
Defendant-Judgment
Debtor-Appellant.

---

An appeal having been taken to this Court by the defendant-judgment debtor-appellant from an order of the Supreme Court, New York County, entered on the 6th day of January, 1966, appointing a receiver of property of the judgment debtor; and said appeal having been argued by Mr. Henry Mark Holzer, of counsel for the appellant, and by Mr. Edward Nathan, of counsel for the respondent; and due deliberation having been had thereon.

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $75 costs and disbursements to the respondent.

Enter,

/s/ FRANK H. CRABTREE,
Deputy Clerk.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 31 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1966

No. 1114

ERWINE LAVERNE,

*Appellant,*

—against—

PIRANESI IMPORTS, INC.,

*Appellee.*

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

## MOTION TO DISMISS

LEON DICKER
*Counsel for Appellee*
635 Madison Avenue
New York, New York

*Of Counsel:*

EDWARD NATHAN
MATTHEW ANENBERG
136 East 57th Street
New York, New York

# INDEX


| | PAGE |
|---|---|
| Motion to Dismiss | 1 |
| Questions Presented | 1 |
| Statement of the Case | 2 |
| ARGUMENT: | |
| 1. This Appeal Does Not Involve Any Substantial Federal Questions | 6 |
| 2. The Alleged Federal Questions Were Not Timely or Properly Raised or Expressly Passed On | 9 |
| 3. The Orders Below Rest On Adequate Non-Federal Grounds | 12 |
| CONCLUSION | 14 |


## TABLE OF CITATIONS

*Cases*:


| | |
|---|---|
| *American Surety* v. *Baldwin*, 287 U.S. 156 | 10 |
| *Bachtel* v. *Wilson*, 204 U.S. 36 | 14 |
| *Bailey* v. *Anderson*, 326 U.S. 203 | 10 |
| *Black* v. *Cutter Laboratories*, 351 U.S. 292 | 12 |
| *Bowe* v. *Scott*, 233 U.S. 658 | 8 |
| *Bratton* v. *Chandler*, 260 U.S. 110 | 8 |
| *Broad River Power Co.* v. *South Carolina ex rel Daniel*, 281 U.S. 537 | 13 |
| *Chicago I. & L. R. Co.* v. *McGuire*, 196 U.S. 128 | 10 |

PAGE

*Consolidated Turnpike Co.* v. *Norfolk & O.V. Ry. Co.*, 228 U.S. 596 ..... 8
*Colby* v. *Klune*, 178 F. 2d 872 (2nd Cir. 1949) ..... 8

*Eddy, Inc.* v. *Fidelity & Deposit Co.*, 265 N.Y. 276, 192 N.E. 410 (1934) ..... 11
*Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157 ..... 8, 13
*Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308 ..... 6
*Erie Railroad* v. *Purdy*, 185 U.S. 148 ..... 10
*Eustis* v. *Bolles*, 150 U.S. 361 ..... 12

*Fox Film Corp.* v. *Muller*, 296 U.S. 207 ..... 13

*Hurwitz* v. *North*, 271 U.S. 40 ..... 7

*Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626 ..... 12

*Leathe* v. *Thomas*, 207 U.S. 93 ..... 13
*Lynch* v. *New York ex rel Pierson*, 293 U.S. 52 ..... 12

*Marrow* v. *Brinkley*, 129 U.S. 178 ..... 11
*McDonald* v. *Oregon Railroad & Navigation Co.*, 233 U.S. 665 ..... 8
*Mellon* v. *O'Neil*, 275 U.S. 212 ..... 12
*Miller* v. *Texas*, 153 U.S. 535 ..... 10

*New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79 ..... 8
*New York ex rel Rosevale Realty Co.* v. *Kleinert*, 268 U.S. 646 ..... 11

*Pim* v. *St. Louis*, 165 U.S. 273 ..... 10

PAGE

*Robusto* v. *Tibbets*, 277 A.D. 1008, 100 N.Y.S. 2d 370 (1950) ..... 11

*Stickney* v. *Kelsey*, 209 U.S. 419 ..... 12
*St. Louis G. & Ft. S. Ry. Co.* v. *Missouri*, 156 U.S 478 7

*Vandalia Railroad* v. *South Bend*, 207 U.S. 359 ..... 13
*Von Diezelski* v. *Food Fair Stores*, 18 A.D. 2d 724, 236 N.Y.S. 2d 603 (1962) ..... 11

*Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112 ..... 7
*Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 ..... 8

*Zucht* v. *King*, 260 U.S. 174 ..... 6, 9

*Statutes*:

New York Civil Practice Law and Rules:

§5228 ..... 5, 6, 7, 8, 10
§5225(a) ..... 7, 9, 10
§5601(b) ..... 11
Article 52 ..... 2

Federal Rules of Civil Procedure; Rule 56 ..... 7

IN THE

# Supreme Court of the United States

October Term, 1966

No. 1114

---

ERWINE LAVERNE,

*Appellant,*

—against—

PIRANESI IMPORTS, INC.,

*Appellee.*

---

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

---

## MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves this Court to dismiss the appeal herein, or in the alternative to affirm the orders below, on the following grounds: (1) The appeal does not present a substantial federal question (2) The federal questions sought to be reviewed were not timely or properly raised or expressly passed on by the Courts of New York (3) The orders rest on adequate non-federal grounds.

### Questions Presented

1. Is there a substantial federal question where the record demonstrates that the appeal is taken frivolously and has no merit?

2. May the Supreme Court hear this appeal although the alleged federal questions have not been timely or properly raised nor have they been passed upon by the highest state court?

3. May the appellant prosecute this appeal where the orders below rest on adequate non-federal grounds?

## Statement of the Case

After a trial of an action for goods sold and delivered, judgment was entered against Erwine Laverne, the appellant herein, and Furniture Textiles & Wallcoverings, Inc., formally Laverne, Inc., in the amount of $35,066.86. The judgment was affirmed on appeal. Subsequently the judgment-creditor, the appellee herein, took steps to enforce the judgment pursuant to Article 52 of the New York Civil Practice Law and Rules.

Initially, appellee attempted to examine appellant as a judgment-debtor. After trying to evade process, he was eventually subpoenaed. However, he failed to appear for the examination and an order was obtained adjudging him in contempt of Court. After appeals and applications for stays failed, appellant then appeared for his examination in order to purge himself of contempt. His patently evasive and incredulous answers and his failure to produce certain documents were a continuation of his plan to frustrate the collection of the judgment.

At his first examination, appellant testified in part that he received $89,000 as a result of a settlement of a claim for personal injury, all of which he gave to his son then living in Israel. He also stated that he has had no other source of income since then. He swore that he owned no property, real or personal, except 15 shares of stock in Piranesi Imports, Inc., which he did not produce at the

examination because he could not find the certificate. Appellant, a designer of furniture and interior decorations, further testified that he is not employed and lives from day to day on small loans from his wife.

Appellant also had incredible lapses of memory. For example, he did not remember whether he had borrowed money from anyone as recently as a month before, whether he had an interest in any life insurance po'icies, or whether he had filed a gift tax return reporting the alleged gift to his son. With respect to this gift, he did not even know the address of his son to whom he had allegedly made this gift and did not know the attorneys who obtained the settlement, or the insurance company involved.

It was discovered by independent investigation that he had caused his corporation, Furniture Textiles & Wallcoverings, Inc., also a judgment-debtor herein to make an assignment of its assets to his wife's corporation, Laverne International, Ltd. Furniture Textiles & Wallcoverings, Inc. was later adjudged bankrupt and the trustee in bankruptcy commenced a suit to set aside this transfer as fraudulent to creditors. It was also learned that, through the device of a credit card, he was charging some of his living expenses to his wife's corporation. Although he had testified that he had no job and received no compensation, his authority to charge these expenses was based on his being an "officer and/or agent" of his wife's corporation. Laverne International, Ltd., his wife's corporation is now in bankruptcy.

These and other tactics of the appellant were set forth in the affidavits in support of appellee's motion for the appointing of a receiver and a turn-over order. The motion papers were served on appellant's attorneys as of that time. However, appellant saw fit to change attorneys for the tenth time in this litigation. The new attorney

applied for an adjournment of both motions but his affidavit demonstrated that he had already been ill and was already in the process of moving his office when he accepted the retainer, that he had not received the file right away because the prior attorneys were holding it under an attorney's lien, and that, in effect, the application was merely another delaying tactic.

After the application for adjournment was denied, appellant submitted affidavits in opposition to both motions which adequately presented whatever defense appellant had. He did not raise any constitutional objections whatsoever. Appellee submitted a reply affidavit together with the transcript* of appellant's examination and other documentary evidence. On the basis of the affidavits, but primarily on the transcript of appellant's testimony, both motions were granted.

Appellant moved for reargument of the motion for a receiver and submitted a lengthy affidavit which again contained no Constitutional objections. The Court below, after considering these papers, again granted the motion.

Appellant thereafter appealed from these orders to the Appellate Division. In his brief he raised, for the first time and somewhat perfunctorily, the issue of a denial of due process as well as a host of other Constitutional objections, including a claim of cruel and unusual punishment. Appellee argued that these Constitutional issues could not be heard since they were not raised below and, in any event, were frivolous and completely without support. The Appellate Division affirmed the orders below without opinion.

---

* Appellant refused to sign the transcript and, in any event, did not raise any objections to the accuracy of the transcript until an application was made to the Court of Appeals and therefore, any objection must be deemed to have been waived.

Thereafter, appellant made an application for reargument or for leave to appeal to the Court of Appeals. While this application was pending, a second examination was held at which appellant testified that most, if not all, of the $89,000 in question was not given to his son in Israel, but was actually deposited in a bank account in Switzerland under the name of himself, his wife, and three children, and that the money had been withdrawn and used by him over a period of years. Although this examination was not part of the original record, it was submitted to the Appellate Division in opposition to appellant's application. The application was denied without opinion.

The testimony from the second examination is significant because this appeal is being based mainly on the phrase "given by Erwine Laverne to his son, and fraudulently hidden or transferred." which is in the original order of the Supreme Court of New York. (Jurisdictional Statement, p. 3a) According to appellant, this merely descriptive phrase was in reality a finding by the Court that appellant had made a transfer to a third party to defraud creditors. In truth, no such finding was made. The "issue" of a transfer to a third person was never raised because no one, least of all the Court below, believed appellant had given the money to his son or any other third person. In other words, the phrase in question merely identifies those moneys which appellant had falsely testified were given to his son, but were actually removed and concealed somewhere. The testimony from the second examination bears this out completely.

Moreover, this alleged finding was not material to the motion for a receiver and did not have to be made in order for the Court to reach its decision. Obviously, a proceeding under §5228 of the CPLR is not one to set aside a fraudulent transfer. The phrase in question was

placed in the order to describe what property the receiver was to receive, as required by §5228.

Therefore, the alleged issue of a fraudulent transfer which was supposedly decided on affidavits without a trial actually does not exist. The other claimed issues arising from these motions were collateral to the determination of the motions and, in any event, do not require a full trial for their resolution.

Appellant made another application to the Court of Appeals for leave to appeal further, arguing the same Constitutional grounds. It was denied without opinion.

## ARGUMENT

### 1. This Appeal Does Not Involve Any Substantial Federal Questions.

Rule 16(b) of the Revised Rules provides that an appeal shall be dismissed on motion where no substantial federal question is involved in the appeal. This Court has refused to take jurisdiction where (a) the federal question has been so foreclosed by prior decisions that there is no need for further argument (*Zucht* v. *King,* 260 U.S. 174) or (b) the appeal has so little merit or substance that further argument or exposition would be superfluous (*Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308). After an examination of the facts and the record below, it will appear that this appeal has been taken frivolously and that the claimed federal questions lack substance.

To begin with, prior decisions of this Court have foreclosed further argument of the matters raised herein. That the use of affidavits to determine the rights of litigants to property is Constitutional needs no authority. The Federal Rules of Civil Procedure are replete with such

summary procedures. If it is not a denial of due process to render final judgment on affidavits alone under Rule 56 of the Federal Rules of Civil Procedure, certainly the appointment of a receiver or a turn-over order in enforcement proceedings after a judgment has already been rendered cannot be a denial of due process. It has been held that the appointing of a receiver, based presumably on affidavits only, does not create any substantial federal question. *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 112; *St. Louis G. & Ft. S. Ry. Co.* v. *Missouri,* 156 U.S. 478.

In any event, it is submitted that there is no merit whatsoever to this appeal. It is axiomatic that due process is concerned with the substance of the procedure in question, not the form. So long as adequate notice, a hearing and an opportunity to be heard is afforded, there is no conflict with the due process clause. What constitutes a sufficient hearing or opportunity to be heard is based on the type of proceeding involved and the nature of the rights to be determined. *Hurwitz* v. *North,* 271 U.S. 40.

§5228 of the CPLR provides for the appointing of a receiver in the Court's discretion, on affidavits, where it is clear that a receiver would aid in satisfying the judgment. It is not a proceeding to declare and set aside transfers to third persons as being fraudulent and no such issues are germane to the proceeding.

Under §5225(a) of the CPLR the Court is enpowered to order property in the possession of the judgment-debtor turned over to the sheriff or a receiver. The affidavits need only show the property is in the hands of the judgment-debtor. Any issues with respect to value or the motives of the judgment-debtor in making the motion are entirely irrelevant.

The proceedings under these sections are merely tools for the enforcement of judgments and as such are summary

in nature. Appellant has not shown, nor can he show, the need for an opportunity to cross-examine witnesses or attack credibility through demeanor evidence in this type of proceeding. See *Colby* v. *Klune,* 178 F. 2d 872 (2nd Cir. 1949) and *Willner* v. *Committee on Character & Fitness,* 373 U.S. 96.

Contrary to appellant's contention, §5228 does not involve, by any rational interpretation, the issue of whether a transfer to a third person occurred and, if so, should it be set aside as fraudulent to creditors. This Court will accept a state court's interpretation of a state statute and will assume that if several interpretations are possible the state court construed it in a way that will avoid Constitutional conflicts. *Bratton* v. *Chandler,* 260 U.S. 110. Therefore appellant was not denied due process by virtue of the construction and application of these statutes by the Court below.

It is submitted that the issue with respect to a "fraudulent transfer" was manufactured by Appellant to create some semblance of a due process question. Obviously, the introduction of a due process issue into an essentially non-federal matter does not automatically create a substantial federal question. *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.,* 243 U.S. 157; *McDonald* v. *Oregon Railroad & Navigation Co.,* 233 U.S. 665; *Bowe* v. *Scott,* 233 U.S. 658. As can be seen from the record herein, this "issue" is in reality a sham and without any factual support whatsoever. Certainly this Court will dismiss an appeal where the record does not factually and legally support the alleged federal question. *New Orleans* v. *New Orleans Water Works Co.,* 142 U.S. 79; *Consolidated Turnpike Co.* v. *Norfolk & O.V. Ry. Co.,* 228 U.S. 596.

The alleged federal question arising under §5225(a) as to whether a trial is necessary under the due process clause is similarly without any substance.

Concerning the alleged violation of appellant's right to meaningful representation by an attorney by virtue of a denial of adjournment, it is submitted that this is another frivolous argument. Appellant's new attorney obviously had adequate time to prepare and submit an affidavit in opposition and, in any event, was later given the opportunity to submit another lengthy affidavit on reargument. It is nonsense to contend that Appellant was denied adequate representation under these circumstances or to compare the case at bar with cases involving the right to counsel in the various stages of criminal type proceedings. The facts of this case demonstrate without any doubt that the denial of the adjournment was not arbitrary. Thus the "issue" of whether Appellant had meaningful representation is without any substance and requires no further consideration by this Court.

Appellant is proceeding by appeal on the basis of alleged issues involving the unconstitutionality of State statutes (Jurisdictional Statement, p. 4-5). Since these issues do not involve a substantial federal question, and since the other question is conceded to be not reviewable except by the granting of certiorari, the entire appeal must be dismissed as to all grounds. *Zucht* v. *King, supra.*

**2. The Alleged Federal Questions Were Not Timely or Properly Raised or Expressly Passed On.**

The claim of a denial of due process and numerous other Constitutional objections were first urged in Appellant's brief before the Appellate Division. Appellee argued in its brief in opposition, among other things, that having failed to raise questions as to the Constitutionality of

§5228 and §5225(a), the Appellate Division could not hear these questions. The Appellate Division affirmed without opinion. In Appellant's applications for reargument and for leave to appeal to the Court of Appeals, which were denied without opinion, the same Constitutional issues were urged as requiring the consideration of a higher Court.

It is a well recognized principle that a federal question must be raised at the first opportunity and preserved throughout the various stages of the litigation. The raising of a federal question for the first time after a final judgment on an application for reargument is not timely and does not sustain this Court's jurisdiction, *Miller* v. *Texas*, 153 U.S. 535, particularly where the application is denied without opinion. *Pim* v. *St. Louis*, 165 U.S. 273; *American Surety* v. *Baldwin*, 287 U.S. 156. It is apparent therefore that the alleged Constitutional issues urged by Appellant here as a basis for this Court's jurisdiction have not been timely raised.

Moreover, it is clear that Appellant has not followed the law of New York in attempting to raise these federal questions in the Appellate Courts of New York. Where a federal question is not raised in accordance with the state law so that the state appellate courts would refuse to consider it, this Court will not assume jurisdiction. *Erie Railroad* v. *Purdy*, 185 U.S. 148; *Bailey* v. *Anderson*, 326 U.S. 203. Although this Court will assume jurisdiction if the highest state court does consider the federal question even though raised improperly, where the highest court is silent as to whether it considered the federal question, it is presumed that the state court has not considered it. *Chicago I. & L. Ry. Co.* v. *McGuire*, 196 U.S. 128.

The law of New York specifically requires that Constitutional issues must be raised in the Court of first instance

before the Court of Appeals may consider them. §5601(b) states that:

> "An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
>
> 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States."

In general, it has been widely held that issues not raised below may not be decided on appeal even if they concern violations of due process. *Eddy, Inc.* v. *Fidelity & Deposit Co.*, 265 N.Y. 276, 192 N.E. 410 (1934); *Von Diezelski* v. *Food Fair Stores*, 18 A.D. 2d 724, 236 N.Y.S. 2d 603 (1962); *Robusto* v. *Tibbets*, 277 A.D. 1008, 100 N.Y.S. 2d 370 (1950). Consequently, it is clear that the alleged federal questions have not been properly raised and it must be presumed that the Appellate Courts of New York have therefore refused to consider them.

In addition to the fact that the alleged federal questions were neither timely nor properly raised, they were never expressly passed upon by the Courts of New York. In order for this Court to obtain jurisdiction, the federal question must have been actually decided and the decision must be necessary to the final determination of the case. *Marrow* v. *Brinkley*, 129 U.S. 178; *New York ex rel Rosevale Realty Co.* v. *Kleinert*, 268 U.S. 646.

If the highest state court is ambiguous or silent, something in the record must indicate that the state court was

presented with and asked to resolve the federal question. *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626. In the case at bar, neither the Appellate Division nor the Court of Appeals rendered any opinions. However, since the record below was devoid of any federal issues (Appellate briefs not being considered as part of the record for this purpose), it must be assumed that the Courts of New York did not pass on the alleged federal questions. *Black* v. *Cutter Laboratories*, 351 U.S. 292; *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52. Any ambiguity with respect to the action taken by the highest state courts will be resolved against the Appellant who has the burden of demonstrating that a federal question was presented and necessarily decided. *Stickney* v. *Kelsey*, 209 U.S. 419.

In any event, the record herein is not ambiguous and clearly indicates that this appeal must be dismissed. In *Mellon* v. *O'Neil*, 275 U.S. 212, this Court refused to assume jurisdiction under nearly the same circumstances as the case at bar.

**3. The Orders Below Rest On Adequate Non-Federal Grounds.**

It is a long established principle that an appeal must be dismissed where an order or judgment below rests on adequate non-federal grounds, even if a federal question had been raised below. *Eustis* v. *Bolles*, 150 U.S. 361. When the record indicates that no federal question was raised or expressly decided and the judgment clearly rests on adequate non-federal grounds, this Court must refuse to hear the appeal. *Lynch* v. *New York ex rel Pierson, supra; Black* v. *Cutter Laboratories, supra.*

In order to be "adequate", the non-federal ground must be not only independent but also tenable. A non-federal ground is independent where the analysis or reasoning of

the highest court in reaching a determination, as indicated in its opinion or from the record, does not depend upon or become interwoven with the resolution of any federal questions. *Fox Film Corp.* v. *Muller*, 296 U.S. 207; *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co., supra.* In determining whether a non-federal ground is tenable, this court will not overrule a state court's decision even if it is open to question, unless the non-federal ground is so erroneously, unfairly, or unreasonably decided that it is clear the state court is attempting to prevent the review of a substantial federal right. *Leathe* v. *Thomas*, 207 U.S. 93; *Vandalia Railroad* v. *South Bend*, 207 U.S. 359; *Broad River Power Co.* v. *South Carolina ex rel Daniel*, 281 U.S. 537.

Based on the above principles, it is submitted that the decisions granting the orders below, as well as the denial of an adjournment, were based on independent and tenable non-federal grounds, namely that the Appellant's own conduct and testimony had demonstrated the need for a receiver and a turn-over of the stock certificates. Nowhere in the motion papers was there any assertion of a Constitutional right, so that the Court below could not have based its decision on the resolution of any federal question.

The alleged Constitutional questions were first raised in Appellant's brief before the Appellate Division. It is apparent that the affirmance of the orders below without opinion was based in part on the independent ground that the alleged Constitutional issues had not been raised in the Court below and could not be decided on appeal. Subsequent applications for reargument and for leave to appeal, further urging the existence of Constitutional questions for decision, were denied without opinion. Under these circumstances, there is a presumption that these decisions were based strictly on non-federal grounds also.

*Bachtel* v. *Wilson*, 204 U.S. 36. Therefore, it is submitted that this appeal must be dismissed.

## CONCLUSION

For the foregoing reasons, the appeal should be dismissed or, in the alternative, the orders of the Court below should be affirmed.

March 30, 1967

LEON DICKER
*Attorney for Appellee*
635 Madison Avenue
New York, New York

*Of Counsel:*

EDWARD NATHAN
MATTHEW ANNENBERG
136 East 57th Street
New York, New York

APR 17 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1966

No. 1114

ERWINE LAVERNE,

*Appellant,*

*against*

PIRANESI IMPORTS, INC.,

*Appellee.*

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

## REPLY TO MOTION TO DISMISS

MONROE H. FREEDMAN,
720—20th Street, N.W.,
Washington, D. C.,
*Counsel for Appellant.*

*Of Counsel:*
LUBELL, LUBELL AND JONES,
JONATHAN W. LUBELL,
STEPHEN L. FINE,
165 Broadway,
New York, N. Y. 10006.

IN THE

# Supreme Court of the United States

October Term, 1966

No. 1114

ERWINE LAVERNE,

*Appellant,*

*against*

PIRANESI IMPORTS, INC.,

*Appellee.*

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

## REPLY TO MOTION TO DISMISS

### I

**Appellee sets forth as "facts" the very allegations which have been disputed by appellant and which were resolved against appellant without a hearing, thereby depriving him of his property without due process of law.**

Appellee commences his Statement of the Case (p. 2) with a recitation of how appellant purportedly sought to evade lawful process to enforce a judgment; how he acted "to purge himself of contempt," etc., etc. Such recital is wholly immaterial and serves only to obscure the real issues herein. Appellee proceeds to recite as "facts" (pp. 3, 4, 5) the very matters whose existence was in such sharp dispute below. It was the existence of these "facts" which appellant strenuously denied in his affidavits in the trial court and which he was denied his constitutional right to litigate.

Appellee notes (p. 4) that appellant submitted affidavits in opposition and that this adequately presented whatever defense appellant had. Yet all these affidavits did was to sharpen and identify the existence of many factual conflicts between the parties. Nevertheless, a receiver was appointed without appellant having had his day in court to litigate those issues. The transcript of an examination of appellant, which appellee describes as being "primarily" the basis upon which the motions were granted (p. 4), is concededly uncorrected and unsigned by appellant.

Appellee now seeks to buttress his case by reference to a purported subsequent examination which was never before the trial court either originally or upon reargument, and which is not part of the record before this Court. Clearly, the attempt to support Court orders by reference to alleged materials never before the Court when the orders were made cannot cure the constitutional infirmities implicit in the trial court's granting of both motions without giving appellant an opportunity for a hearing. (See Jr. St. 11). This Court has never held constitutional infirmities to be cured by subsequent proceedings, particularly where the notice and hearing requirement is involved. To the contrary, such subsequent proceedings have been rejected as an excuse for denying due process at the initial proceeding. See, e.g., *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965).

Moreover, the purported transcript of the subsequent examination is not only unsigned and uncorrected; it has never even been seen by appellant. The attempt to rely upon this unsigned, uncorrected and unread transcript is another illustration of appellee's effort to eliminate the existence of factual disputes upon which no hearing has been held by treating its bald assertions as undisputed facts. Finally, if the second examination contains details which appellee charged were not presented by appellant in the first (Nathan affirmation, Nov. 8, 1965) or if there be

inconsistencies between the two transcripts, the subsequent transcript, in either event, emphasizes the existence of fact questions concerning the first, which appellee contends the trial court "primarily" relied upon in appointing a receiver without a hearing.

The trial court's phrase "given by Erwine Laverne to his son, and fraudulently hidden or transferred," in referring to the $89,000, cannot be passed off as a "merely descriptive phrase" (p. 5). Obviously, when the trial court specified the $89,000 as part of the property to be received (see N.Y.C.P.L.R. Sec. 5228 (a)), it thereby determined that Erwine Laverne had acted fraudulently for it could not otherwise have treated this money "given by Erwine Laverne to his son" as still, constructively at least, in the possession of Erwine Laverne and therefore available to his creditors. Indeed, this is precisely what the Court found, without a hearing, when it added the unambiguous phrase "fraudulently hidden or transferred." (Jur. St. 3a)

## II

**For a state court to deprive a litigant of $89,000 without a hearing to resolve disputed facts constitutes a serious violation of due process and presents a substantial federal question.**

1. Appellant, of course, agrees that under certain circumstances rights can be determined on the basis of affidavits alone. However, such a determination must be based upon affidavits which do not reveal on their face substantial and sharply disputed questions of fact, as is the case herein. (See Jur. St. 12, 13) That receivers were appointed "presumably" based on affidavits (as asserted by appellee, p. 7) finds no support in either *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 112 (1909), or *St. Louis, Cape Girardeau and Fort Smith Railway Co.* v. *Merriam*, 156 U.S. 478 (1895)

both cited by it. Neither of these cases speak at all about appointment of receivers on the basis of any affidavits, no less affidavits showing sharp factual disputes.

2. The Constitutional issue herein is not avoided by noting that the nature of the notice and hearing required by due process may vary based on the type of proceeding involved and the nature of the rights to be determined (p. 7). The real problem herein is that *no* hearing whatsoever was allowed where the determination of substantial property rights was made solely on the basis of sharply conflicting affidavits (See Jur. St. 10, 11).

3. Appellee misses the point of this appeal when he attempts to limit it to the sole question of the appointment of a receiver. A receiver was not appointed in the abstract. Rather, he was expressly appointed as the receiver of certain specific property including the $89,000. This is equally true of the turn-over order which specifies a particular piece of property to be turned over. By the orders of the trial court issued without a hearing concrete property rights of the appellant have been actually impaired.

4. Appellee suggests (p. 8) that appellant must justify his demand for a hearing by showing his "need" to cross-examine witnesses or attack credibility in the proceedings below. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915), clearly demonstrates that in a proceeding such as this, to charge appellant's purported property with a judgment debt, notice and hearing are required, without a showing of necessity. *Colby* v. *Klune*, 178 F.2d 872 (2nd Cir. 1949), cited by appellee, does not hold otherwise. Nothing therein suggests that the party seeking the trial must show a "need." Indeed, that case strongly supports appellant's contention that where factual disputes exist in the affidavits a trial must be had, as the case will then turn on credibility of witnesses. See also *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F.2d 1016 (3rd Cir. 1942). Nor is *Willner* v.

*Committee on Character & Fitness*, 373 U.S. 96 (1963), contrary. There it was held that due process had been denied petitioner in failing to accord him a hearing on his application to the bar. There is nothing therein to indicate that any burden was on petitioner to show the necessity for a hearing. Notice and hearing are essential and indispensible and do not depend upon showing a "need." (Jur. St. 10, 11)

5. In opposition to appellant's argument that he was denied meaningful legal representation, appellee notes that appellant's new attorney was given an opportunity to file an affidavit on reargument (p. 9). Clearly this does not cure the constitutional infirmity inherent in the trial judge's failure, originally, to grant appellant's requested continuance. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), this Court held that it is no defense to a claim of denial of due process to show that petitioner had his day in court through use of a motion to set aside a decree, on the grounds that the burden of proof had unconstitutionally shifted to petitioner. This exact situation exists herein. Appellant was denied meaningful legal representation prior to the original decision of the trial court. This constitutional infirmity clearly, and particularly in light of *Armstrong*, was not cured by appellant moving for reargument, because the burden of proof had unconstitutionally shifted to him.

## III

**The federal questions were timely raised at all stages of the proceeding below.**

1. Appellee asserts (pp. 9-12) that appellant failed to raise the federal questions in the trial court below and raised them for the first time in the Appellate Division. The record clearly indicates that at the very commencement of these proceedings appellant raised his constitutional claim to a trial or hearing on the merits. (See Laverne Affidavit, Dec. 15, 1965).

This Court has never required magic words or precise formulas for such a purpose: "if the record as a whole shows either expressly or by clear intendment that [the claim was brought to the attention of the state court] the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 68 (1928). Similarly, this Court noted in *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58, 67 (1898) that: "no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court." See also *St. Louis, Iron Mountain & Southern Railway Co.* v. *Starbird*, 243 U.S. 592 (1917).

Appellee contends that in *Mellon* v. *O'Neill*, 275 U.S. 212 (1927), the Court, "under nearly the same circumstances", refused jurisdiction (p. 12). Yet that case is clearly inapplicable to the case at bar because there the Federal constitutional issue was not even raised in the state appellate courts. Similarly, in *Miller* v. *Texas*, 153 U.S. 535 (1894), *Pim* v. *St. Louis*, 165 U.S. 273 (1897), and *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932) (cited by appellee, p. 10), this Court refused to take jurisdiction because, in each case, the Federal constitutional question was raised for the first time on a motion to reargue in the highest appellate court of the state involved.

2. Neither *Bailey* v. *Anderson*, 326 U.S. 203 (1945), or *Erie R. Co.* v. *Purdy*, 185 U.S. 148 (1902), are authority for the proposition stated by appellee (p. 10) that a litigant is required to follow state procedures in raising Federal constitutional issues. The rule that state procedures must be followed applies only where there are specially prescribed procedures laid down under state rules; these must be complied with in order properly to preserve a constitutional question for this Court. *Williams* v. *Georgia*, 349

U.S. 375, 382, 383 (1955). See, e.g., where special state procedures should have been complied with: *Parker* v. *Illinois*, 333 U.S. 571 (1948); *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190 (1925); *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447 (1936). The rule is clearly inapplicable herein where New York State has provided no special avenue or proceeding by which to raise constitutional objections. Appellant herein has raised the constitutional question, first in the trial court, and then at each level of appeal thereafter and the state law requires no more than this.

3. When appellant first appealed to the Appellate Division from the two orders in question herein, he sought reversal on the basis of five claims of law, all of which were constitutional objections to the trial court's actions, except one which claimed error in the order directing turnover of the stock certificate to the sheriff rather than to the receiver. In affirming without opinion, the Appellate Division obviously decided these constitutional questions adversely to appellant. It has never been essential that a state appellate court expressly pass on the constitutional questions presented, so long as these questions appear in the record, which is the case herein, *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626 (1900), and so long as the necessary effect of the appellate court's judgment is to deny those claims, *Roby* v. *Colehour*, 146 U.S. 153, 159 (1892). See also *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 231, 232 (1897); *Sayward* v. *Denny*, 158 U.S. 180, 183, 184 (1895).

Patently, the cases cited by appellee (p. 11) do not require a contrary conclusion. In *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U.S. 646, 650 (1925), this Court noted that the constitutional question had to have been called to the attention of the state appellate court *or*, even if not called to its attention, nevertheless had to have been

decided by it. And in *Marrow* v. *Brinkley*, 129 U.S. 178 (1889), the state appellate court had rested its decision specifically on state law grounds. Similarly, both *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52 (1934), and *Black* v. *Cutter Laboratories*, 351 U.S. 292 (1956), involved state appellate decisions which rested on sufficient state law grounds.

Such doctrines are clearly inapplicable herein where the only possible ground of review was on the constitutional points raised in appellant's papers to the Appellate Division. This is not a case of ambiguity or of support in the state court opinions on both federal and non-federal grounds. Appellee is trying to inject ambiguity where none exists.

## IV

**There is no adequate non-federal ground on which to rest the orders below.**

Appellee's argument regarding the presence of adequate non-federal grounds obviously misconceives the nature of that doctrine. Appellee describes the non-federal grounds as "Appellant's own conduct and testimony [which] demonstrated the need for a receiver and a turn-over of the stock certificates." (p. 13). However, these very grounds necessarily raised the federal question.

The determination of what was the nature and meaning of appellant's conduct and testimony was the subject of sharp factual dispute in the affidavits. To thereupon appoint a receiver and order a turnover was, thus, to raise the federal constitutional issue of whether appellant's rights could be determined without a hearing solely on the basis of affidavits containing sharp disputes of fact.

This Court's discussion of the non-federal ground doctrine in *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935) (cited by appellee, p. 13), clearly shows that there are no

adequate non-federal grounds. In the cited case this Court noted that a purported non-federal ground is so interwoven with the federal question as to not deprive the court of jurisdiction where the non-federal ground has the effect of bringing forward for determination the federal question. This is precisely the situation herein. To base the orders on appellant's "own conduct and testimony" necessarily raised for determination the constitutional question of whether such orders could be made without a hearing on appellant's conduct and testimony upon which there had been sharp factual disputes in the affidavits.

## CONCLUSION

**Appellant respectfully requests that the substantial and important constitutional questions herein be given plenary consideration.**

Respectfully submitted,

MONROE H. FREEDMAN,
720—20th Street, N.W.,
Washington, D. C.,
*Counsel for Appellant.*

*Of Counsel*:
LUBELL, LUBELL AND JONES,
JONATHAN W. LUBELL,
STEPHEN L. FINE,
165 Broadway,
New York, N. Y. 10006.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

## LAVERNE *v.* PIRANESI IMPORTS, INC.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 1114. Decided May 8, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.